STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-001697

Shawn Williams, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

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Certiorari is not warranted to address whether State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), applies retroactively in light of State v. Belcher. 5

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QUESTION PRESENTED

1. Is Certiorari necessary for this Court to revisit its holding in State v. Belcher that pronounced that the opinion would not apply retroactively to subsequent PCR cases?

STATEMENT OF THE CASE

The Anderson County Grand Jury indicted Petitioner at the April 2007 term of General Sessions for murder and possession of a weapon during the commission of violent offense (2007-GS-04-1451), and death or injury to a child in utero due to the commission of a violent offense (2008-GS-04-2554). (App.pp.406-12). He was represented by Robert Gamble, Esq.

After the State called the case to trial, Petitioner was found guilty as indicted. On January 8, 2009, the Honorable J.C. Nicholson, Jr., sentenced Petitioner to aggregate term of life imprisonment. (App.p.308).

A notice of appeal was filed at the South Carolina Court of Appeals and was perfected by Robert M. Dudek, Esq., of the South Carolina Office of Appellate Defense pursuant to Anders v. California[1]. (App.pp.311-23). The Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. State v. Shawn Williams, Op. No. 2011-UP-361 (filed June 30, 2011). (App.p. 324).

Petitioner filed an application for post-conviction relief (PCR) on September 21, 2012. (App.pp.325-34). A hearing was convened at the Anderson County Courthouse on May 8, 2013. (App.pp.342-93). Petitioner was present and represented by Todd W. Pruette, Esq. Walt Whitmire, Esq. of the Office of the Attorney General represented Respondent. The Honorable R. Lawton McIntosh denied relief in an order dated August 1, 2013. (App.pp.394-405).

This Petition and Respondent's Return now follows.

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[1] Anders v. California, 386 U.S. 738 (1967).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

Certiorari is not warranted to address whether State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), applies retroactively in light of State v. Belcher.

At the PCR hearing, Petitioner argued counsel should have objected to the Trial Judge's improper jury instruction that malice could be inferred by the use of a deadly weapon. (App.p.355). He 'eruditely' opined that the instruction constituted a violation of his constitutional rights.

Counsel testified that at the time of trial he had no legal basis to object to the Trial Judge's instruction on the inference of malice from the use of a deadly weapon jury instruction. (App.pp.378-79). Counsel stated, "unless I was seer or able to project to the future, I don't think I could have raised that." (App.p.379, ln. 1-2). He noted that the South Carolina Supreme Court's seminal State v. Belcher opinion had not yet been issued at the time of trial. (App.p.379). On cross-examination, counsel again explained why he had no viable basis to object to the instruction.

> I was just a plain old criminal lawyer at that time and I could not guess what the Supreme Court was liable to do or not do and I took the law as it was given to me and that was what I had to use and to answer the question, if I objected to the inference of malice, I would have no basis for it as that time.

(App.p.386, ln. 15-20) (emphasis added). The PCR Judge pronounced that Petitioner's allegation here was without merit because he was simply was per se precluded from proving Strickland's deficiency prong. (App.p.390). In the PCR Judge's order of dismissal, he found "[Petitioner]'s allegation that trial counsel should have objected to the trial judge's jury instruction that malice may be inferred from the use of a deadly weapon

is without merit." (App.p.403) (internal quotations omitted). The PCR Judge astutely noted that a Strickland inquiry regarding the constitutional sufficiency of counsel's performance is determined by the controlling jurisprudent at the time of trial. (App.p.403).

Effective Assistance of Counsel

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id., 466 U.S. at 690. A criminal defense is not bound by a duty of clairvoyance concerning facts and law unknown at the time of the representation. Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993).

Discussion

The PCR judge correctly found that Petitioner was incapable of proving counsel

was deficient for failing to object to jury instruction that was permissible at the time of trial. Petitioner was tried and convicted for murder during the week of January 5, 2009. The Trial Judge instructed the jury on matter in question as follows:

> Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is an article, instrument, or substance to likely cause death or great bodily harm. When an instrument has been used as a deadly weapon depends upon the facts and circumstances of each case.
>
> ***
>
> The use of a deadly weapon permits you to infer malice, but does not require you to infer malice. In other words, if such conduct resulted directly in the death of another, such conduct is culpable and inexcusable, so aggravated and grossly reckless as to show an active, intentional disregard of the consequences of human life, thus denoting a malignant spirit, a hear devoid of social duty fatally bent of mischief, the implication of malice may arise.

(App.p.291, ln.3-8; p.291, ln. 12-21) (emphasis added). In this Court's opinion in Belcher, it held the jury instruction that the use of a deadly weapon allows for the permissive inference of malice is improper and can constitute reversible error. Belcher, at 601, 685 S.E.2d at 804. This Court issued its opinion in Belcher over nine months after Petitioner's jury trial. This Court extensively detailed the historiography of the gradual shift in its jurisprudence concerning the viability of jury instructions on presumptions and inferences that must and may arise from the use of a deadly weapon. Id., at 602, 685 S.E.2d at 804. This Court held, in no uncertain terms, that its pronouncement in Belcher constituted a new rule governing criminal prosecutions that will not apply to convictions challenged on post-conviction relief. Id. at 613, 685 S.E.2d at 811 (emphasis added).

In the present case, Petitioner now asserts that counsel's performance was deficient because historical precedent announced in State v. Hopkins was of such

significance to render a defense attorney's performance here deficient for failing to make a unsustainable objection to the permissive charge that instructed the jury that they may infer malice from the use of a deadly weapon. Respondent's Petitioner's argument is facially flawed where circuit court judge's instruction on a mandatory, burden shifting, presumption of malice in Hopkins was simply inapposite to the present case. State v. Hopkins, 15 S.C. 153 (1881). Notably, the United States Supreme Court's nearly forty year old opinion in Sandstrom v. Montana, held that any jury instruction that creates a mandatory presumption is unconstitutional. Sandstorm v. Montana, 422 U.S. 510, 524 (1979). Petitioner's argument directs this Court to compare apples to oranges; thus, the Trial Judge's jury instruction on the permissive inference here was valid until well after the completion of Petitioner's trial. Therefore, the PCR Judge, correctly, agreed with counsel that his lack of a supernatural gift of clairvoyance does not render his performance deficient.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: J. Wallace Whitmire
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Sept. 8th, 2014

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S.C. Supreme Court

Hon. J. Cordell Maddox, Jr., Circuit Court Judge
Appellate Case No. 2013-001697

SHAWN WILLIAMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Carmen V. Ganjehsani, Esquire
S.C. Commission on Indigent Defense
1330 Lady St., Suite 401
Columbia, SC 29211

This 8th day of September, 2014

Ashley Haworth
LEGAL ASSISTANT for the Respondent

ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

September 8, 2014

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia SC 29211

RE: **Shawn Williams v. State of South Carolina**
Appellate Case No: 2013-001697

Dear Mr. Shearouse:

Enclosed for filing is the original Return to Petition for Writ of Certiorari and six copies in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General
SC Bar No: 100793

JWW/lg
Enclosures

cc: Carmen V. Ganjehsani, Esquire